FEE 937A

30

No. 05-1382

FILED
SEP 20 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

ALBERTO R. GONZALES,
ATTORNEY GENERAL,

Petitioner,

v.

PLANNED PARENTHOOD
FEDERATION OF AMERICA, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR INTERVENOR-RESPONDENT CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

THERESE M. STEWART
Chief Deputy City Attorney

ALEETA VAN RUNKLE
Chief Deputy, Neighborhood and Community Services

KATHLEEN S. MORRIS
Deputy City Attorney
Counsel of Record

City and County of San Francisco
OFFICE OF THE CITY ATTORNEY
Fox Plaza, 6th Floor
1390 Market Street
San Francisco, CA 94102-5408
(415) 554-3987

COCKLE LAW BRIEF PRINTING CO. (800) 225 6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that the "Partial Birth Abortion Ban Act of 2003," Pub. L. No. 108-105, 117 Stat. 1201 (18 U.S.C. § 1531 (Supp. III 2003)) ("Act"), is unconstitutional on its face because it effectively bans all forms of dilation and evacuation ("D & E") abortions, the most commonly used previability second-trimester abortion method, and therefore imposes an undue burden on a woman's right to end a previability pregnancy?

2. Whether the Court of Appeals correctly held that the Act is unconstitutionally vague because it fails to provide fair warning of the medical procedures it bans and permits arbitrary and discriminatory enforcement?

3. Whether the Court of Appeals correctly held that the Act is unconstitutional on its face, even if it is construed as banning only the intact variant of D & E abortion, because it bans such abortions even when they are safer for the woman?

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 11

ARGUMENT 13

I. THROUGHOUT ITS HISTORY, THE COURT HAS CONSISTENTLY REJECTED ATTACKS ON ITS CONSTITUTIONAL AUTHORITY 13

II. CONGRESS PASSED THE ACT IN AN INTENTIONAL EFFORT TO OVERRULE *STENBERG* 24

III. THE COURT SHOULD STRIKE DOWN THE ACT AS AN ATTEMPT TO USURP ITS CONSTITUTIONAL AUTHORITY 29

CONCLUSION 32

TABLE OF AUTHORITIES

Page

CASES

Ayotte v. Planned Parenthood of N. New England, 126 S. Ct. 961 (2006) 11

Brown v. Board of Education, 347 U.S 483 (1954) 12, 20, 21, 30

Bush v. Gore, 531 U.S. 98 (2000) 31

City of Boerne v. Flores, 521 U.S. 507 (1997) ..... *passim*

Cooper v. Aaron, 358 U.S. 1 (1958) 21, 30

Dickerson v. United States, 530 U.S. 428 (2000) 12, 21, 22, 30

Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) 22

Fairfax's Devisee v. Hunter's Lessee, 11 U.S. [7 Cranch.] 603 (1812) 16, 17

Gonzales v. Planned Parenthood Federation of America, et al., 126 S. Ct. 2901 (2006) 11

Lawrence v. Texas, 539 U.S. 558 (2003) 31

Marbury v. Madison, 5 U.S. [1 Cranch.] 137 (1803) 11, 13, 14, 18, 24

Martin v. Hunter's Lessee, 14 U.S. 304 (1816) 17

M'Cullough v. Maryland, 17 U.S. 316 (1819) 17, 18

Miranda v. Arizona, 384 U.S. 436 (1966) 21, 30

Osborn v. Bank of the United States, 22 U.S. 738 (1824) 18

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) 3, 10, 27

Roe v. Wade, 410 U.S. 113 (1973) 27

TABLE OF AUTHORITIES – Continued

Page

Romer v. Evans, 517 U.S. 620 (1996) 31

Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1289 (11th Cir. 2005), *stay denied*, 544 U.S. 957 (2005) 31

Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223 (11th Cir. 2005) 31

Stenberg v. Carhart, 530 U.S. 914 (2000) ..... *passim*

Texas v. Johnson, 491 U.S. 397 (1989) 24, 30

United States v. Eichman, 496 U.S. 310 (1990) ... 12, 23, 24, 30

United States v. Nixon, 418 U.S. 683 (1974) 29

United States v. Peters, 9 U.S. [5 Cranch.] 115 (1809) 12, 14, 15, 16

Worcester v. Georgia, 31 U.S. 515 (1832) 19, 20

STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Constitution Article III 13

Partial Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (18 U.S.C. § 1531 (Supp. III 2003) 4, 7, 8, 26

Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.* 22

Flag Protection Act, 18 U.S.C. § 700 (amended in 1989) (originally enacted as Pub. L. 90-381 (1968) 23, 24

Neb. Rev. Stat. Ann. § 28-326(9) (Supp. 1999) 2, 26

CONGRESSIONAL RECORD AND REPORTS

149 Cong. Rec. H4924 (daily ed. June 4, 2003) 6

149 Cong. Rec. H4941 (daily ed. June 4, 2003) 6

TABLE OF AUTHORITIES – Continued

Page

149 Cong. Rec. H4946 (daily ed. June 4, 2003) 9
149 Cong. Rec. H4948 (daily ed. June 4, 2003) 6
148 Cong. Rec. H5349 (daily ed. July 24, 2002) 9
149 Cong. Rec. S3395 (daily ed. March 10, 2003) 6
149 Cong. Rec. S3456 (daily ed. March 11, 2003) 9
149 Cong. Rec. S3486 (daily ed. March 11, 2003) 9
149 Cong. Rec. S3480 (daily ed. March 11, 2003) 3, 25
149 Cong. Rec. S3481 (daily ed. March 11, 2003) 7
149 Cong. Rec. S3483 (daily ed. March 11, 2003) 7
149 Cong. Rec. S3486 (daily ed. March 11, 2003) 13
149 Cong. Rec. S3576 (daily ed. March 12, 2003) 6
149 Cong. Rec. S3579 (daily ed. March 12, 2003) 7
149 Cong. Rec. S3604 (daily ed. March 12, 2003) 8
149 Cong. Rec. S3611 (daily ed. March 12, 2003) 7
149 Cong. Rec. S3645 (daily ed. March 12, 2003) 28
149 Cong. Rec. S12936 (daily ed. October 21, 2003) 5
149 Cong. Rec. S12942 (daily ed. October 21, 2003) 7
149 Cong. Rec. S12943 (daily ed. October 21, 2003) 28
H. Doc. No. 104-198 (142 Cong. Rec. H3338 (1996)) 1
H. Doc. No. 105-158 (143 Cong. Rec. H8891-04 (1997)) 1
H.R. Rep. No. 108-58, 108th Cong., 1st Sess. 6, 8, 25

TABLE OF AUTHORITIES – Continued

Page

BILLS

H.R. 1122, 105th Cong. 1

H.R. 1833, 104th Cong. 1

H.R. 3660, 106th Cong. (as passed by House, April 5, 2000) 1, 25, 26

S. 1692, 106th Cong. (as passed by House, May 25, 2000) 1, 25, 26

S. 1692, 106th Cong. (as passed by Senate, October 21, 1999) 1, 25, 26

OTHER REFERENCES

The Federalist No. 48 (James Madison) 13, 30

The Federalist No. 78 (Alexander Hamilton) 32

Homer Carey Hockett, Political and Social Growth of the American People, 1492-1852 (1937) 19

Dwight Wiley Jessup, Reaction and Accomodation: The Supreme Court & Political Conflict, 1809-1835 (1987) 14, 15, 16, 17, 18

Lucas A. Powe, Jr., The Warren Court and American Politics (2000) 20

Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359 (1997) 14, 29

Dale Carpenter, *Judicial Supremacy and its Discontents*, 20 Const. Comment. 405 (2003) 14, 20, 21

William O. Douglas, *Interposition and the Peters Case, 1778-1809*, 9 Stan. L. Rev. 3 (1956) 14, 15, 16

TABLE OF AUTHORITIES – Continued

Page

Christopher L. Eisgruber & Lawrence G. Sager, *Why The Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. Rev. 437 (1994).....22, 23

Andrew Jackson, *Veto Message* (July 10, 1832), in 2 A Compilation of the Messages and Papers of the Presidents 576, 582 (1907)..... 19

STATEMENT OF THE CASE

This is a case in which Congress deliberately sought to usurp this Court's constitutional authority at a time in our history when protections for individual liberties, and strict adherence to the rule of law, are as important as ever before.

1. In the years leading up to this Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), Congress made several attempts to ban what it terms "partial-birth abortions."[1] Congress passed such bans in 1996 and 1997. President Clinton vetoed both bills because neither contained an exception that would allow a physician to perform a banned procedure if a woman's life or health required it. *See* H.R. 1833, 104th Cong. (as passed by Congress and vetoed by the President; veto override failed in Senate, September 26, 1996); H.R. 1122, 105th Cong. (as passed by Congress and vetoed by the President; veto override failed in Senate, September 18, 1998). Thus, in the President's view, they were unconstitutional. *See* H. Doc. No. 104-198 (142 Cong. Rec. H3338 (1996)); H. Doc. No. 105-158 (143 Cong. Rec. H8891-04 (1997)).

In the year leading up to this Court's decision in *Stenberg*, both houses of Congress approved new "partial-birth abortion" bans. *See* H.R. 3660, 106th Cong. (as passed by House, April 5, 2000); S. 1692, 106th Cong. (as passed by Senate, October 21, 1999); S. 1692, 106th Cong.

---

[1] Contrary to the Government's representation (Brief for the Petitioner 2), "partial-birth abortion" does not have a fixed meaning. It is a term of art that means whatever the applicable statute says it means. *See Stenberg*, 530 U.S. at 950 (O'Connor, J., concurring) (comparing definitions of "partial-birth abortion" in statutes enacted by the Nebraska, Kansas, Utah and Montana legislatures).

(as passed by House, May 25, 2000). These bills, which Congress never enacted, defined "partial-birth abortion" as:

> an abortion in which the person performing the abortion deliberately and intentionally –
>
> (A) vaginally delivers some portion of an intact living fetus until the fetus is partially outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the fetus while the fetus is partially outside the body of the mother; and
>
> (B) performs the overt act that kills the fetus while the intact living fetus is partially outside the body of the mother.

2. This Court decided *Stenberg* on June 28, 2000. *Stenberg* invalidated a Nebraska statute that banned "partial-birth abortions," defined as:

> deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.

Neb. Rev. Stat. Ann. § 28-326(9) (Supp. 1999).

This Court struck down the Nebraska statute for two reasons. First, although counsel for Nebraska argued its legislature had intended to ban only intact D & Es, the Court found the above definition of "partial-birth abortion"

broad enough to reach non-intact D & Es.[2] Accordingly, the ban placed "'a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus'" in violation of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Stenberg*, 530 U.S. at 938-39 (quoting *Casey*). Second, the statute lacked an exception that would allow a physician to perform a banned procedure if a woman's health required it. *Id.* at 930-31.

Stenberg provided clear instructions for how to ban intact D & Es in a manner that comports with *Casey*. First, the legislation must make plain – by defining "partial-birth abortion" in a manner that uses medical terms and tracks the precise steps taken in performing an intact D & E[3] – that before viability a physician is permitted to perform a non-intact D & E. *Id.* at 939-40; *see also id.* at 950 (O'Connor, J., concurring). Second, the legislation must permit a physician to perform an intact

---

[2] The courts below used the terms "intact D & E" and "non-intact D & E" rather than "D & X" and "D & E," respectively. As the Ninth Circuit stated, "[t]he labeling of the procedure is of no consequence to our analysis; however, for simplicity's sake we prefer intact and non-intact D & E. What is relevant, however, is that one could substitute D & X for intact D & E wherever the latter term appears in our opinion and nothing would change in any respect." Pet. App. 3a-4a & n.3. This brief uses the same terminology as the opinions below.

[3] Intact D & E is defined by American College of Obstetricians and Gynecologists as:

> (1) the deliberate dilation of the cervix, usually over a sequence of days;
>
> (2) instrumental conversion of the fetus to a footling breech;
>
> (3) breech extraction of the body, excepting the head; and
>
> (4) partial evacuation of the intercranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus.

149 Cong. Rec. S3480 (daily ed. March 11, 2003).

D & E if the woman's health requires it. *Id.* at 930-31; *see also id.* at 947-48 (O'Connor, J., concurring).

3. Congress responded to *Stenberg* by passing the Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (18 U.S.C. § 1531 (Supp. III 2003)) ("Act"). Petitioner (sometimes, the "Government") claims that, "[i]n drafting the Act, Congress deliberately sought to remedy the deficiencies identified by this Court in the statute at issue in *Stenberg*. . . ." Brief for the Petitioner ("Pet. Br.") 3. However, the Act's language, legislative findings and congressional history demonstrate that the sponsors did *not* set out to comply with *Stenberg*. Instead, they set out to overrule *Stenberg*.

The Act defines "partial-birth abortion" as:

> (A) deliberately and intentionally vaginally deliver[ing] a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and
>
> (B) perform[ing] the overt act, other than completion of delivery, that kills the partially delivered living fetus.

Act § 3, 117 Stat. 1206-1207 (18 U.S.C. § 1531(b)(1) (Supp. III 2003)).

This language fails to comply with *Stenberg* in two respects. First, although the above definition uses different language than the statutes previously enacted by Congress and the Nebraska legislature, it does not comport with

Stenberg's instructions for drafting a constitutional ban on intact D & E. The Act does not, for example, expressly ban only intact D & Es, or expressly exclude non-intact D & Es and inductions; and its language does not track the most commonly-used medical definition of intact D & E. *See supra* note 3.

During the Senate debate on the Act, Sen. Feinstein pointed out that the sponsors had not merely failed but actually *refused* to redraft the Act to incorporate the accepted medical definition of intact D & E:

> The sponsors of the bill have refused to use a definition of D & X that I suggested and that tracks the medical definition submitted by the American College of Obstetrics and Gynecologists. Why? Why would they refuse to use a definition suggested by the elite medical group of obstetricians and gynecologists who deal with this issue – a definition that would enable those obstetricians and gynecologists to know exactly what this legislation makes a crime?
>
> * * * *
>
> The refusal of the sponsors of the bill to accept the medical definition of intact D & E is revealing. It makes it clear they are not really intent or interested in banning intact D & E or D & X, but, rather, they seek to muddy the waters to make it harder for women to get a legal abortion using other legal and acceptable techniques.

149 Cong. Rec. S12936 (daily ed. October 21, 2003) (statement of Sen. Feinstein).

During the House debates, Rep. Nadler offered a similar criticism:

> This bill as written fails every test the Supreme Court has laid down for what may or may not be a constitutional regulation on abortion. It reads almost as if the authors went through the Supreme Court's recent decision in *Stenberg v. Carhart* and went out of their way to thumb their noses at the Supreme Court.

H.R. Rep. No. 108-58, 108th Cong., 1st Sess., at 73-74.[4] The House and Senate sponsors who rose to respond to Sen. Feinstein and Rep. Nadler's arguments did not address why they refused to define "partial-birth abortion" in a manner that tracked the medical definition of intact D & E.

Second, the sponsors deliberately excluded a health exception from the Act, even though *Stenberg* unambiguously requires one. *See Stenberg*, 530 U.S. at 930-31. Several members of Congress attempted to correct this constitutional infirmity by offering amendments that would have added a health exception to the Act, but Congress voted them down. *See* 149 Cong. Rec. H4948

---

[4] *See also* 149 Cong. Rec. S3576 (daily ed. March 12, 2003) (statement of Sen. Mikulski) ("The proponents of this legislation say they have made changes to the bill to address the Supreme Court's ruling [in *Stenberg*]. They have not. . . . It still does not clearly define the procedure it claims to prohibit."); 149 Cong. Rec. S3395 (daily ed. March 10, 2003) (statement of Sen. Boxer) ("[The bill] puts an undue burden because we don't know at what stage the woman is going to get this abortion and whether this procedure applies to it or not."); 149 Cong. Rec. H4924 (daily ed. June 4, 2003) (statement of Rep. Green) ("[this legislation] continues to flout the Supreme Court's rulings by continuing to ban certain procedures. . . ."); 149 Cong. Rec. H4941 (daily ed. June 4, 2003) (statement of Rep. Kirk) ("We are setting Congress up for a defeat at the hands of our highest Court, rendering the action we take today totally ineffective and the current law permitting late-term abortions unchanged.").

(daily ed. June 4, 2003), 149 Cong. Rec. S3611 (daily ed. March 12, 2003), 149 Cong. Rec. S3579 (daily ed. March 12, 2003); *see also* 149 Cong. Rec. S3481-82 (daily ed. March 11, 2003) (statement of Sen. Durbin, offering amendment 259); 149 Cong. Rec. S3483-84 (daily ed. March 11, 2003) (statement of Sen. Collins).

The Act's chief Senate sponsor explained that he had excluded a health exception, and would oppose any amendment to add one, because he disagrees with that constitutional requirement:

> Health is an exception that swallows the rule. . . . [w]hat this provision did, and that is what the Court wanted to do, was to give absolute latitude to the doctor to do whatever the doctor wanted to do in consultation with the patient. So the health exception is no exception at all. It is a barred antiprohibition. So understand that the health exception bars the bill, stops the bill from having any effect. So that is why we resist.

149 Cong. Rec. S12942 (daily ed. October 21, 2003) (statement of Sen. Santorum).

The Government claims Congress permissively circumvented *Stenberg* with respect to the health exception requirement by making different factual findings than the Court made in *Stenberg*. Pet. Br. 18-27. Specifically, Congress rejected *Stenberg*'s finding that there was "substantial medical authority" that the ban would pose threats to some women's health; and instead "found" the opposite, namely, that "[a] moral, medical, and ethical consensus exists" that intact D & E is never necessary to preserve the health of *any* woman. Act §§ 2(1), (14(O)).

For the reasons set forth in the brief filed by Respondents Planned Parenthood Federation of America and Planned Parenthood Golden Gate (collectively, "Planned Parenthood"), Congress' findings of fact relating to the health exception issue are entirely constructed and demonstrably false.[5] Nevertheless, the Act's sponsors apparently believed that by announcing utterly unsupported "findings," they could overrule *Stenberg*. *See* Act § 2(8)-(13).

Indeed, throughout the floor debates, the Act's supporters made plain that their intent was to overrule *Stenberg* and strike at the heart of this Court's abortion jurisprudence:

> The reason we are back is not *just* to say the Court was wrong or that we disagree with the Court's judgment on constitutionality, although I do. I have to say the Court's view of the constitutionality of abortion statutes is really quite remarkable. . . . The Court has basically said there are no restrictions on abortion.
>
> * * * *
>
> I hope the Justices read this **RECORD** because I am talking to you. . . . I understand the Justices' feelings on the issue of abortion. It is evident from your decisions. It is obvious from your position. But you can't ignore the facts. Don't ignore the facts, because they are clear. . . . It is crystal

---

[5] *See also* H.R. Rep. No. 108-58 at 142 (Rep. Scott) ("It's one thing to reach findings, but it's another thing to just make up findings"); 149 Cong. Rec. S3604 (daily ed. March 12, 2003) (statement of Sen. Lautenberg) ("There is an old saying: Everyone is entitled to their own opinion, but not their own facts.").

> clear. . . . [T]here is no reason for a health exception. Take the obligation you have seriously because I can tell you, the Members of this body do. We take our constitutional obligations dead seriously. The weight of evidence is not just overwhelming, it is dispositive. Listen. Learn. Decide justly.

149 Cong. Rec. S3456, S3486 (daily ed. March 11, 2003) (statements of Sen. Santorum).

In the House, Reps. Linder and Delay similarly rejected calls to comply with *Stenberg* and rallied Congress to defy this Court. Rep. Linder stated:

> [Opponents of the Act] tell us we have no right to legislate a ban on this horrible practice because the Supreme Court says we cannot. . . . I believe the Congress has its own duty to create and pass laws that protect the people of this country.

148 Cong. Rec. H5349 (daily ed. July 24, 2002) (statement of Rep. Linder).

Rep. Delay c[illegible]ed in:

> I came to the House to pass very strong, important legislation and then to fight in the courts for my position. I do not let the courts decide what direction I go.

149 Cong. Rec. H4946 (daily ed. June 4, 2003) (statement of Rep. Delay).

4. President Bush signed the Act into law on November 5, 2003. Planned Parenthood filed suit in the United States District Court for the Northern District of California, asking that it restrain the Government from enforcing the Act. The case was assigned to Judge Phyllis

Hamilton, who temporarily restrained enforcement of the Act. The City and County of San Francisco ("City") intervened as a plaintiff to protect the interests of medical providers and patients at San Francisco General Hospital ("SFGH"). SFGH is a county facility that contains a major trauma center and serves, among others, women who are too poor to go elsewhere, and women who are too sick to obtain treatment outside of a hospital setting.

Judge Hamilton combined the preliminary injunction hearing with a bench trial on the merits. The trial began March 29, 2004, and lasted three weeks. The district court heard live testimony from thirteen expert witnesses, received deposition transcripts from six additional expert witnesses, and reviewed the relevant portions of the Congressional Record. On June 1, 2004, the district court ruled the Act unconstitutional and permanently enjoined its enforcement. Pet. App. 55a-218a.

The district court held that the Act suffers from three separate constitutional infirmities. First, after analyzing the expert testimony, it found that the Act has the practical effect of banning the same abortion procedures as the Nebraska statute struck down in *Stenberg*. Pet. App. 80a-85a. Accordingly, it places an undue burden on women seeking a previability abortion in violation of *Casey*. Second, it found the Act unconstitutionally vague because physicians reading it "do not understand exactly what the Act prohibits." Pet. App. 92a. Third, it found that, even if the Act could somehow be construed as only banning intact D & Es in a manner that was not unduly vague, it would still be unconstitutional for failure to include a health exception. Pet. App. 213a-217a.

The Ninth Circuit affirmed on all three grounds. Pet. App. 1a-54a. It also addressed the question of how to remedy the Act's constitutional defects in light of this Court's recent decision in *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961 (2006). Applying *Ayotte*, the court concluded that it had to invalidate the Act in its entirety. Pet. App. 41a. Specifically, the court decided that it would be improper to issue an injunction that adds a health exception to the statute when Congress had deliberately excluded it:

> Congress did not inadvertently omit a health exception from the Act. It was not only fully aware of *Stenberg's* holding that a statute regulating "partial-birth abortion" requires a health exception, but it adopted the Act in a deliberate effort to persuade the Court to reverse that part of its decision.

Pet. App. 42a. This Court granted certiorari to consider the constitutionality of the Act. *Gonzales v. Planned Parenthood Federation of America, et al.*, 126 S. Ct. 2901 (2006).

SUMMARY OF ARGUMENT

The City joins in Planned Parenthood's brief, and in an effort to avoid duplication will not reiterate arguments made therein. Instead, the City writes to urge the Court to reject Congress' attempt to usurp its constitutional authority under *Marbury v. Madison*, 5 U.S. [1 Cranch.] 137, 177 (1803).

This case is about much more than the constitutionally-protected right to an abortion. It is about whether the

coordinate branches of government can get away with defying the Court's ultimate authority "to say what the law is." *Id.* The Court has been faced with such acts of defiance throughout our nation's history, from the showdown between federal and state troopers in the wake of *United States v. Peters*, 9 U.S. [5 Cranch.] 115 (1809), to the southern States' resistance to *Brown v. Board of Education*, 347 U.S 483 (1954), to the acts of congressional defiance overturned in *Dickerson v. United States*, 530 U.S. 428 (2000), *City of Boerne v. Flores*, 521 U.S. 507 (1997) and *United States v. Eichman*, 496 U.S. 310 (1990).

The Court has consistently responded to acts of defiance – from whatever quarter – by reasserting its authority as the ultimate interpreter of the Constitution. And partly for that reason, over time our democracy has matured to the point where such acts of defiance are relatively infrequent and the rule of law is generally treated with respect.

The Act, like the statutes in *Dickerson*, *City of Boerne* and *Eichman*, is unquestionably an episode of congressional defiance. Far from complying with the Court's ruling in *Stenberg*, the Act's sponsors insisted over repeated objections by their colleagues that they would *not* comply. They drafted the statute so that it has the effect of banning both intact and non-intact D & Es; and they defied *Stenberg*'s requirement that an abortion restriction include a health exception.

The sponsors made no secret of the fact that they had set out to defy the Court:

> I hope the Justices read this **RECORD** because I am talking to you. . . . Take the obligation you have seriously because I can tell you, the Members of

> this body do. We take our constitutional obligations dead seriously. . . . Listen. Learn. Decide justly.

149 Cong. Rec. S3486 (daily ed. March 11, 2003) (statement of Sen. Santorum).

The structure of our Constitution is designed in part to protect us from ourselves. "It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it." The Federalist No. 48 (James Madison). The past half-decade has seen our democracy enter a delicate time in its history. Our collective need to be protected by Congress and the Executive Branch has undoubtedly increased; but so has the need to safeguard the civil liberties of politically unpopular minorities. This Court has never allowed Congress to overturn a constitutional precedent. Now is not the time for it to send a message to the coordinate branches, or for that matter to the States, that public officials may ignore or overrule Supreme Court rulings because they happen to disagree with them.

ARGUMENT

I. THROUGHOUT ITS HISTORY, THE COURT HAS CONSISTENTLY REJECTED ATTACKS ON ITS CONSTITUTIONAL AUTHORITY.

Article III of the Constitution established a "judicial department" with the "province and duty . . . to say what the law is." *Marbury v. Madison*, 5 U.S. [1 Cranch.] 137, 177 (1803). As the Court explained in *City of Boerne v. Flores*, 521 U.S. 507 (1997):

> When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*, 1 Cranch, at 177, 2 L. Ed. 60. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.

Id. at 536.

Politically-motivated attacks on the Court's constitutional authority are as old as the Constitution itself. In the early days of our Republic, such defiance typically originated in the several States; more recently, challenges to the Court have originated from the co-equal branches of the federal government. *See generally* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359 (1997); Dale Carpenter, *Judicial Supremacy and its Discontents*, 20 Const. Comment. 405 (2003); Dwight Wiley Jessup, Reaction and Accomodation: The Supreme Court & Political Conflict, 1809-1835 (1987).

The earliest attack on the Court's constitutional authority was Pennsylvania's armed resistance to its decision in *United States v. Peters*, 9 U.S. [5 Cranch.] 115 (1809). William O. Douglas, *Interposition and the Peters Case*, 1778-1809, 9 Stan. L. Rev. 3, 9 (1956); Jessup, *supra*, at 140-41. *Peters* addressed the seemingly straightforward question of which of three claimants was entitled to prize money for having captured a British ship during the

Revolutionary War. *Peters*, 9 U.S. [5 Cranch.] at 136-37; Douglas, *supra*, at 9; Jessup, *supra*, at 140-41. Several parties – including Gideon Olmstead, who had led a daring prisoner's rebellion against the ship's captain – claimed entitlement to the money, which had been placed in the hands of the state treasury. *Peters*, 9 U.S. [5 Cranch.] at 137; Douglas, *supra*, at 4; Jessup, *supra*, at 140-42. Olmstead sought relief in Pennsylvania state court, where a jury awarded him just one-fourth of the total prize. Douglas, *supra*, at 5; Jessup, *supra*, at 141.

Unhappy, Olmstead appealed to a committee of the Continental Congress, which at the time had appellate jurisdiction over state court admiralty decisions. The committee reversed the state court decision. Pennsylvania refused to comply with the committee's ruling, stating that a congressional committee lacked the constitutional authority to overrule a Pennsylvania jury. Douglas, *supra*, at 406; Jessup, *supra*, at 141-42.

Years later, Olmstead sought and obtained a district court order requiring Pennsylvania to obey the congressional committee's ruling, but Pennsylvania would not relent. To the contrary, the Governor urged the legislature to resist the district court order, and the legislature passed a statute defying the district court's decree. Jessup, *supra*, at 142. The statute further ordered the Governor "to protect the just rights of the State from any process issued by an [sic] Federal Court." Jessup, *supra*, at 142 (citations omitted). Apparently for fear of political fallout, the district court judge declined to take steps to enforce the order. Douglas, *supra*, at 8; Jessup, *supra*, at 142.

Olmstead petitioned this Court for a writ requiring the district court to enforce the federal order. *Peters*, 9 U.S.

[5 Cranch.] at 115. This Court (Marshall, C.J.) granted the petition, stating:

> If the Legislatures of the several States may, at will, annul the judgments of the Courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the Nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals.

Peters, 9 U.S. [5 Cranch.] at 136.

In response to *Peters*, the Governor of Pennsylvania – backed by the State legislature – called up the militia and ordered it to resist enforcement of the federal order. Douglas, *supra*, at 9; Jessup, *supra*, at 143. When the U.S. Marshal tried to effect service of this Court's writ, he was met by members of the Pennsylvania militia armed with bayonets. Douglas, *supra*, at 9; Jessup, *supra*, at 143-44. Not to be outdone, the U.S. Marshal called up 2,000 federal troops to help execute service of the writ. Douglas, *supra*, at 9; Jessup, *supra*, at 144. The Pennsylvania Governor asked then-President James Madison to intervene, but the President refused to do so. Douglas, *supra*, at 9-10; Jessup, *supra*, at 144. Pennsylvania ultimately withdrew the militia and accepted the *Peters* decision. Douglas, *supra*, at 10-11; Jessup, *supra*, at 144.

Pennsylvania's challenge to the Court's authority was followed by similar acts of defiance by other States in the Union, among them Virginia and Ohio. In one example, the Virginia high court attempted to rebel against the Court's ruling in *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. [7 Cranch.] 603 (1812). In *Fairfax's Devisee*, this

Court overturned a ruling of the Virginia court attempting to divest property rights protected by federal treaties. *Id.* at 627-28. Enraged, the Virginia court announced that the Judiciary Act (by which this Court had exercised appellate jurisdiction) was unconstitutional; and further, that States could nullify measures of the national government they viewed to be unconstitutional, and decisions of the federal judiciary they viewed as invalid. Jessup, *supra*, at 162. This Court responded by upholding the Judiciary Act and generally reaffirming its supremacy with respect to interpretations of federal law. *See Martin v. Hunter's Lessee*, 14 U.S. 304, 342-44 (1816).

In another example, Ohio defied the Court's ruling in *M'Cullough v. Maryland*, 17 U.S. 316 (1819), which held that the States lacked the authority to tax the National Bank ("the Bank"). *See* Jessup, *supra*, at 183-213. Congress had chartered the Bank, a quasi-public entity, in 1816, and it soon grew to become the "biggest single financial transactor" in the U.S. economy. *Id.* at 183-84. In 1818, the Bank altered its lending and monetary policies in an effort to curb inflation, thereby triggering the depression of 1819. *Id.* at 185. As a result, the Bank became the target of tremendous hostility in the States, some of which attempted to tax it out of business. *Id.* at 185-87. The Ohio legislature enacted a tax against the Bank in 1819. *Id.* at 232-33. The Ohio statute, appropriately termed the "Crow-Bar Law," specifically required Ohio's auditor, Ralph Osborn, to enter the Bank and physically seize assets to satisfy the tax. *Id.* at 233.

One month after Ohio enacted its tax on the Bank, this Court ruled in *M'Cullough* that a similar Maryland tax was unconstitutional. *Id.* at 232. Subsequently, Bank officials filed a petition in federal court to enjoin Osborn

from seizing federal assets. *Id.* at 233. In the meantime, Osborn commissioned a collector, John Harper, to enter the Bank and seize sufficient assets to satisfy the tax. Harper entered the Bank, took possession of the vault, and removed $120,422. *Id.* The federal court issued a writ ordering Harper and Osborn to return the money, but they refused. *Id.* Subsequently, the Ohio treasurer, Hiram Curry, returned most of the money to the Bank. *Id.* The Bank pressed criminal charges against Harper and Osborn, who were jailed for three months. *Id.*

The Ohio legislature responded by adopting resolutions against the Bank and the federal court. One resolution expressly rejected not only *M'Cullough* but *Marbury*; it announced that "any decision of the United States Supreme Court in questions of political rights and political powers 'is not conclusive of rights decided by it.'" *Id.* at 235 (citation omitted). The legislature subsequently passed a statute that purported to nullify *M'Cullough*. *Id.* at 235-36.

Nearly two years later, the lower federal court invalidated Ohio's Bank tax and ordered Ohio to pay restitution and penalties to the federal government. *Id.* at 240. The Ohio treasurer refused to comply with that order, and was arrested for contempt. The U.S. Marshal removed the keys to the Ohio treasury from the treasurer's pocket, went to the state treasury, and seized assets to satisfy the federal judgment. *Id.* at 241. Ohio appealed the decision to this Court, which reaffirmed *M'Cullough* in *Osborn v. Bank of the United States*, 22 U.S. 738 (1824).

Defiance of the Court has not been limited to the States. Federal officials have also resisted its authority from time to time. In perhaps the most famous early act of

Executive Branch defiance, President Andrew Jackson rejected *Worcester v. Georgia*, 31 U.S. 515 (1832), in which the Court held that the State of Georgia had no jurisdiction over territory granted under federal law to the Cherokee Indian Tribe. *Id.* at 593-95 (Marshall, C.J.). President Jackson's policy with respect to the Indian tribes was that they were legally required to submit to the laws of the States in which they lived. Homer Carey Hockett, Political and Social Growth of the American People, 1492-1852, at 502 (1937). In his first annual message to Congress, Jackson announced that all Indian tribes must submit to state law or migrate west of the Mississippi. *Id.* Congress agreed, and passed a statute effectuating Jackson's policy. *Id.* In Georgia, state officials began to take steps towards extending jurisdiction over members of the Cherokee Tribe, who turned to the courts for relief. In *Worcester*, this Court held that the Cherokees were entitled to territorial integrity and governmental autonomy pursuant to binding federal treaties. *Worcester*, 31 U.S. at 593-95.

President Jackson refused to comply with the Court's order, reputedly announcing: "John Marshall has made his decision; now let him enforce it." Hockett, *supra*, at 502. Jackson eventually sent federal troops into Georgia, but they evicted the Cherokees, not the Georgians. *See id.* at 503. He later made explicit his view that Supreme Court opinions did not bind Congress or the Executive Branch:

> The authority of the Supreme Court must not . . . be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve. (Andrew Jackson, *Veto Message* (July 10, 1832), in 2 A Compilation of the

Messages and Papers of the Presidents 576, 582 (1907).)

More than a century after *Worcester*, President Eisenhower faced the question of how a President should respond to a Supreme Court decision with which he disagrees. That decision was *Brown v. Board of Education*, 347 U.S 483 (1954). When the Court first decided *Brown*, Eisenhower announced that he would play no role in enforcing it. *See* Lucas A. Powe, Jr., The Warren Court and American Politics 35-36, 157 (2000). Subsequently, however, Eisenhower reversed course and ordered 1,100 federal troops from the 101st Airborne into Little Rock to desegregate a public school. *Id.* at 157-59.

In contrast to Eisenhower's actions, members of Congress and local officials from the southern States pursued a strategy of prolonged resistance to *Brown*. *Id.* at 60-62, 157 *et seq.*; *see also* Dale Carpenter, *Judicial Supremacy and its Discontents*, 20 Const. Com. 405, 417-20 (2003). For example, southern Democrats in Congress came together to issue an attack on *Brown* in the form of a document that became known as the "Southern Manifesto." Powe, *supra*, at 60-62. The Manifesto declared that this Court had "abandoned the Constitution" and it was up to federal and state officials to "reclaim it." *Id.* at 61. By the mid-1950's, several southern states had adopted pro-segregation statutes. *Id.* at 61, 66-68; Carpenter, *supra*, at 417-18. The legislatures of Alabama, Mississippi and Louisiana issued formal announcements refusing to comply with what they saw as the Court's flawed interpretation of the Fourteenth Amendment, and several other states either encouraged or tolerated popular resistance through "vigilantism and mob violence." Carpenter, *supra*, at 418.

In 1958, all nine justices of the Court famously rebuked the southern States' defiance of *Brown* by issuing a joint opinion stating that *Brown* was the law of the land and every public school in the country had to comply with its mandate:

> [T]he interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Cooper v. Aaron, 358 U.S. 1, 18 (1958) (citation omitted).

In the years since *Cooper*, governmental actors and the public as a whole have generally come to accept that this Court is the final and supreme authority on constitutional interpretation. Carpenter, *supra*, at 408-12. As compared to our nation's early history, attempts to usurp the Court's authority have become relatively rare. *Id.* at 409-10. Notably, however, such defiance has taken a new form, namely, efforts by Congress to overrule constitutional precedents.

In *Dickerson v. United States*, 530 U.S. 428 (2000), the Court considered an act of Congress that purported to eliminate the Fourth Amendment requirement, first identified in *Miranda v. Arizona*, 384 U.S. 436 (1966), that the fruits of custodial interrogations are only admissible if the suspect is advised of his rights prior to the interrogation. *Dickerson*, 530 U.S. at 435. The federal statute at issue in *Dickerson* purported to replace the so-called *Miranda* warnings with the general rule in effect before *Miranda* was decided, namely, that the fruits of custodial interrogations were admissible if voluntarily obtained.

Dickerson, 530 U.S. at 431, 441-43. The Court struck down that statute, ruling that Congress could not "legislatively supersede our decisions interpreting and applying the Constitution." *Id.* at 437 (*citing City of Boerne v. Flores*, 521 U.S. 507 (1997)).

In *City of Boerne*, the Court considered the constitutionality of the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.* ("RFRA"). *City of Boerne*, 521 U.S. at 511. Congress had enacted RFRA in direct response to *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), in which the Court held that neutral, generally applicable laws that burden religious practices may withstand constitutional challenge even if they are not supported by a compelling governmental interest. *See id.* at 512-13; *see generally* Christopher L. Eisgruber & Lawrence G. Sager, *Why The Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. Rev. 437, 437 (1994).

As with *Stenberg*, the Court's constitutional interpretation in *City of Boerne* was "debated by Members of Congress in hearings and floor debates. Many criticized the Court's reasoning, and this disagreement resulted in the passage of RFRA," which purported to overrule *Smith*. *City of Boerne*, 521 U.S. at 515. At the time of its passage, RFRA enjoyed overwhelming popular and political support. As Eisgruber & Sager describe:

> The Act sailed through both houses of Congress, passing unanimously in the House of Representatives and drawing only three votes in opposition in the Senate. President Clinton declared that the signing ceremony had a "majestic quality" because the new law affirmed "the historic role that people of faith have played in the history of this country

> and the constitutional protections those who profess and express their faith have always demanded and cherished."

Eisgruber & Sager, *supra*, at 438.

The Court invalidated RFRA, in part because it was an attempt by Congress to usurp the Court's constitutional authority:

> The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those prohibitions.
>
> * * * *
>
> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it." *Marbury v. Madison*, 1 Cranch., at 177, 2 L.Ed. 60. Under this approach, it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

City of Boerne, 521 U.S. at 524, 529 (citation omitted).

Finally, in *United States v. Eichman*, 496 U.S. 310 (1990), the Court considered the constitutionality of the Flag Protection Act, 18 U.S.C. § 700 (amended in 1989) (originally enacted as Pub. L. 90-381 (1968)). *Eichman*, 496 U.S. at 312. The Flag Protection Act provided in pertinent part:

> Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

18 U.S.C. § 700(a)(1).

Congress passed the Flag Protection Act after the Court decided *Texas v. Johnson*, 491 U.S. 397 (1989), in which it held that a Texas prohibition on destroying or defiling the American flag violated the First Amendment. *Id.* at 416-17. In *Eichman*, the Government argued on behalf of Congress that the federal statute's language distinguished it from the statute invalidated in *Johnson*, but in any case, the Court should overrule *Johnson* in view of the national consensus against flag desecration. *Eichman*, 496 U.S. at 317-18. The Court struck down the Flag Protection Act and reaffirmed *Johnson*. *Id.* at 317-19.

The Court has consistently rejected attacks on its constitutional authority "to say what the law is." *Marbury*, 5 U.S. [1 Cranch.] at 177. As we explain below, the Act is an attempt by Congress to do exactly that.

II. CONGRESS PASSED THE ACT IN AN INTENTIONAL EFFORT TO OVERRULE *STENBERG*.

The Court in *Stenberg* made plain that a ban on "partial-birth abortion" would only pass constitutional muster if it banned intact D & E while unmistakably preserving non-intact D & E; and if it contained a health exception. *Stenberg*, 530 U.S. at 939, 950 (O'Connor, J., concurring). The Government argues that Congress attempted to comply with *Stenberg* by drafting a definition of "partial-birth abortion" that bans only intact D & Es.

However, the Act's language and legislative history prove otherwise.

The simplest way for a legislature to ban intact D & E to the exclusion of all other abortion methods is to use the term "intact D & E" (or "D & X") in the statute and to track with precision the steps involved in performing that procedure. The Act's drafters did not take this approach despite their familiarity with the relevant medical terminology. *See supra* note 3; *see also* H.R. Rep. No. 108-58, 108th Cong., 1st Sess., at 4 n.5 (distinguishing D & E abortions from "partial-birth abortions"), *id.* at 14 (equating "partial-birth abortions" with "D & X abortions"); 149 Cong. Rec. S3480 (daily ed. March 11, 2003) (describing the medical steps involved in performing an intact D & E). They also failed to include language that would allow a physician to perform a "partial-birth abortion" if the woman's health required it.

While the Act's language is different from prior congressional bills and the Nebraska statute invalidated in *Stenberg*, the differences are not constitutionally meaningful. Congress' pre-*Stenberg* bills, H.R. 3660 and S. 1692, defined "partial-birth abortion" as:

> an abortion in which the person performing the abortion deliberately and intentionally –
>
> (A) vaginally delivers some portion of an intact living fetus until the fetus is partially outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the fetus while the fetus is partially outside the body of the mother; and

> (B) performs the overt act that kills the fetus while the intact living fetus is partially outside the body of the mother.

See H.R. 3660, 106th Cong. (as passed by House, April 5, 2000); S. 1692, 106th Cong. (as passed by Senate, October 21, 1999); S. 1692, 106th Cong. (as passed by House, May 25, 2000).

The Nebraska statute defined "partial-birth abortion" as:

> deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.

Neb. Rev. Stat. Ann. § 28-326(9) (Supp. 1999). The Act defines "partial-birth abortion" as:

> (A) deliberately and intentionally vaginally deliver[ing] a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and
>
> (B) perform[ing] the overt act, other than completion of delivery, that kills the partially delivered living fetus.

18 U.S.C. § 1531.

The Act suffers from exactly the same constitutional infirmities as the *Stenberg* statute: It does not define

"partial-birth abortion" in a manner that limits its reach to intact D & E; and it does not contain a health exception. As the Ninth Circuit explains, any non-intact D & E could proceed in a manner that violates the Act. Pet. App. 25a-26a ("Congress defined the prohibited procedure in a way that a number of doctors have explained includes both intact and non-intact D & E's, and that we likewise conclude bans both forms of the procedure."); *cf. Stenberg*, 530 U.S. at 940 ("we can find no difference, in terms of this statute, between the D & X procedure as described and the D & E procedure as it might be performed."). While Congress was not required to follow the Court's drafting suggestions in *Stenberg*, it *was* required to draft the Act in a manner that addressed the constitutional problems identified in that case. The sponsors' deliberate decision not to do so – over the clamorous objections of many of their colleagues (*see supra* note 4 and accompanying text) – is powerful evidence that they set out not to comply with *Stenberg* but to defy it.

The Act's legislative history supports the same conclusion. In rallying Congress to adopt the Act, the chief Senate sponsor railed not only at *Stenberg*, but *Casey*, *Roe v. Wade*, 410 U.S. 113 (1973), and even the concept of constitutionally-protected liberties:

> The Senator from Iowa read the famous clause out of the *Casey* decision, determining one's own concept of meaning of existence, of the universe, of the meaning of the universe, of the mystery of human life.
>
> * * * *
>
> I referred to the two killers from Columbine who said: I am the law. Where do you think they got that? Where do you think that came from? It

> came from the U.S. Supreme Court because that is what the Supreme Court says, that you are the law. You can define your own existence. You can define your own universe. That is the essential meaning of liberty. That wasn't in a dissenting opinion or a concurring. It was in the main body of [*Roe v. Wade*].
>
> * * * *
>
> *Roe v. Wade* is, according to the Court, how they will decide abortion cases. I vehemently disagree with them and I will continue to fight on this floor and anywhere else I can to make sure that law, that Court decision taking the decision away from the American public – which is where it was prior to *Roe v. Wade* – taking the decision of great moral import away from the American public, is returned to the people.

149 Cong. Rec. S3645 (daily ed. March 12, 2003) (statement of Sen. Santorum); 149 Cong. Rec. S12943 (daily ed. October 21, 2003) (statement of Sen. Santorum).

Contrary to the Government's claim, the Ninth Circuit is not attempting to hold Congress to "impossible standards of draftsmanship." Pet. Br. 35. To suggest that Congress lacks the institutional competence to draft a statute that complies with *Stenberg* is absurd; indeed, one would be hard-pressed to imagine a simpler legislative task. If this Court were to strike down the Act, Congress could, if it wished, turn right around and enact a constitutional ban on intact D & E.

III. THE COURT SHOULD STRIKE DOWN THE ACT AS AN ATTEMPT TO USURP ITS CONSTITUTIONAL AUTHORITY.

While all three branches of the federal government are initially charged with interpreting the Constitution in the exercise of their duties, once this Court decides a constitutional question, its interpretation is authoritative and supreme. *City of Boerne v. Flores*, 521 U.S. at 535-37, *United States v. Nixon*, 418 U.S. 683, 703 (1974). *See generally* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359, 1377 (1997) ("When the Constitution is subject to multiple interpretations, a preconstitutional norm must referee among interpretations to decide what is to be done. One such norm is that the Supreme Court's interpretation is authoritative and supreme."). As Alexander & Schauer explain:

> The decision to create a single written constitution, and thus depart from a model of parliamentary supremacy, is based on the possibility of varying views about fundamental questions, and the undesirability of leaving their resolution to shifting political fortunes.
>
> * * * *
>
> [A]t times good institutional design requires norms that compel decisionmakers to defer to the judgments of others with which they disagree. Some call this positivism. Others call it formalism. We call it law.

Id. at 1376, 1387.

Official acts of defiance against the Supreme Court are most chilling where, as here, they involve attempts to

strip away politically unpopular constitutional rights. At such times the Court is the only force preventing unpopular rights and groups from falling prey to an "elective despotism:"

> An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectively checked and restrained by the others.

The Federalist No. 48 (James Madison) (emphasis in original). It is for this reason that cases like *Miranda*, *Johnson* and *Brown* hold such an important place in the history of our constitutional democracy. And it is why the Court's decisions in *Dickerson*, *Eichman* and *Cooper*, reaffirming the rights protected in those cases, are equally important.[6]

Imagine if the states refused to comply with the Court's ruling in *Miranda*, and instead insisted that the Fifth Amendment allowed the admission of confessions regardless of the officers' failure to advise the suspect of

---

[6] Separation of powers principles cut against the Court making any attempt to salvage the Act via a narrowing construction. The Government cites a number of cases that emphasize the wisdom of salvaging federal statutes whenever "possible." Pet. Br. 35-36. Whatever "possible" means, it surely *cannot* mean forcing a statutory interpretation plainly antithetical to congressional intent. As discussed in the Statement of the Case and section II, *supra*, the Act's language, findings and legislative history demonstrate that Congress *did not want* to limit the ban to intact D & E and *did not want* a health exception. The Court should not force a statutory construction that flies in the face of what Congress intended.

his constitutional rights. And imagine if, when federal courts issued writs of habeas corpus for the release of those prisoners, the states refused to comply, announcing, "Earl Warren has made his decision, now let him enforce it."

Imagine if, in the wake of *Romer v. Evans*, 517 U.S. 620 (1996), states across the country enacted statutes modeled after Colorado's Amendment 2, and refused to abide by federal court orders enjoining their enforcement. Or if, in the wake of *Lawrence v. Texas*, 539 U.S. 558 (2003), states continued to prosecute and imprison gay men and lesbians based on their private sexual conduct, and refused to honor federal writs ordering their release.

Imagine if, after the Eleventh Circuit decided *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223 (11th Cir. 2005), and *Schiavo ex rel. Schindler v. Schiavo*, 403 F. 3d 1289 (11th Cir. 2005), *stay denied*, 544 U.S. 957 (2005), Florida Governor Jeb Bush sent in State troopers to seize Terry Schiavo, transport her to a hospital, and force doctors to restore her nutrition and hydration.

Worse yet, imagine if in the wake of *Bush v. Gore*, 531 U.S. 98 (2000), Vice President Gore had refused to recognize the legitimacy of the Court's ruling and urged his supporters to resist it. Or if Congress had refused on January 6, 2001, to certify the electoral votes of Florida on the ground that the results were constitutionally illegitimate absent the completion of a recount.

Our nation is at a point in its history when the need to preserve the rule of law is at a premium. The tension between law enforcement obligations and the need to protect the civil liberties of politically unpopular groups is particularly strong. It is times like these when each

branch must fulfill its constitutional duties with firm conviction. "'[T]here is no liberty, if the power of judging be not separated from the legislative, and executive powers.'" The Federalist No. 78 (Alexander Hamilton) (quoting Montesquieu). The Act is a bold attempt by Congress to wrest judicial power from the Court. It cannot stand.

CONCLUSION

For the reasons set forth above, the City asks the Court to strike down the Act in its entirety.

Respectfully submitted,

DENNIS J. HERRERA
City Attorney

THERESE M. STEWART
Chief Deputy City Attorney

ALEETA VAN RUNKLE
Chief Deputy, Neighborhood
and Community Services

KATHLEEN S. MORRIS
Deputy City Attorney
Counsel of Record

City and County of San Francisco
OFFICE OF THE CITY ATTORNEY
Fox Plaza, 6th Floor
1390 Market Street
San Francisco, CA 94102-5408
(415) 554-3987